STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. Ken-20-169

July 14, 2020

CLARE HUDSON PAYNE, et al.,

Plaintiffs/Appellants,

vs.

SECRETARY OF STATE, et al.,

Defendant/Appellee.

On report from the Kennebec County Superior Court
Docket No. AUGSC-CV-2020-50

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Appellee-Defendant Matthew Dunlap (the "Secretary of State") and Appellee-Intervenor Demitroula Kouzounas (the "Referendum Proponent") contend that this court should disregard its long-held tenant of interpreting the Maine Constitution using its plain language, and instead jump to the conclusion that Article IV, Part 3, Section 16 of the Constitution must be read much more broadly than its words suggest in order to effectuate the people's veto right set forth in Article IV, Part 3, Section 17. In fact, the Court can faithfully apply the Constitution's plain language without abridging the people's veto right. Section 17 does not limit itself to chaptered laws acted upon by the governor. Rather, the people's veto right in Section 17 expressly extends to "bills" not yet endorsed by the governor. Section 17's applicability to bills ensures the people's veto right is guaranteed, even in cases such as this when Section 16's plain language sets a bill's earliest-available effective date before the Governor takes final action.

Turning to the application of 21-A M.R.S.A. § 901(1), the Secretary of State and the Referendum Proponent again claim that plain language application of the law must be disregarded to avoid any potential threat to the Constitutional people's veto right. But the Appellees' argument fails to consider that Article IV, Part 3, Section 17 was always intended to limit signature gathering and that the plain language of Section 901(1) is entirely consistent with the Constitutional language.

Satisfying the high bar of obtaining the signatures required to initiate a people's veto is *supposed* to be hard. Accordingly, the limitations that 21-A M.R.S.A. § 901(1) impose to restrict the availability of people's veto petitions until the time when the Legislature adjourns are consistent with the Maine Constitution.

ARGUMENT

I. THE PLAIN LANGUAGE OF ARTICLE IV, PART 3, SECTION 16 REQUIRES THAT THE SESSION IN WHICH A BILL PASSED BE INTERPRETED TO MEAN THE SESSION IN WHICH THE LEGISLATURE VOTED TO PASS THE BILL.

The Secretary of State and the Referendum Proponent argue that Article IV, Part 3, Section 16's reference to "the session of the Legislature in which [a bill or act] was passed" must mean that session in which it became law. Appellees argue their interpretation is required because any alternative interpretation would circumvent the people's constitutional right to legislate by referendum. Red Br. 9, 13; Green Br. 13. Additionally, the Referendum Proponent contends that a 1979 Opinion of the Attorney General supporting Appellees' interpretation of Section 16 commands this Court's deference as evidence of a "long course of government conduct" misconstruing the constitutional sections at issue. Green Br. 13. Appellees' arguments against correct construction of Section 16's plain language are without merit, and addressed in turn.

A. The People's Constitutional Right to Referendum is Not Threatened by the Faithful Construction of Section 16.

Appellees contend that defining Section 16 to establish a bill's earliest-available effective date 90 days after the Legislature's action would threaten the people's absolute right "to approve or disapprove legislation enacted by the legislature." Green Br. 10 (quoting *Farris ex rel. Dorsky v. Goss*, 143 Me. 227, 231 (1948)); Red Br. 13. Specifically, Appellees assert that only a chaptered law is subject to a people's veto, and that "until then, there is only a bill – and no law to veto," Green Br. 16.

This argument is without merit. Article IV, Part 3, Section 17 does not require a chaptered law to be in effect before the people's veto right can be exercised. Rather, the people's veto rights in Section 17 expressly extends to "bills." Article IV, Part 3, Section 2, establishes that "every *bill* … having the force of law," after having "passed both Houses," shall be presented to the governor for approval. The Appellee-Intervenor concedes that until the Governor acts on the legislation, "there is *only* a bill," Green Br. 16 (emphasis added). However, bills are expressly included in Section 17's list of legislative documents that are subject to the people's right of legislative referendum. Section 17 provides that "Acts, *bills*, resolves or resolutions" can be referred to the people for referendum upon delivery of a petition, thereby suspending the document from taking effect as otherwise scheduled. Me. Const. Art. IV, Pt. 3, § 17 (emphasis

added). The opportunity Section 17 provides the people to veto bills prior to executive approve ensures a broad referendum right that accounts for a variety of circumstances in which the governor might approve, veto or allow the bill to become law without signature. All without potentially circumventing the people's veto right.

Section 17's inclusion of bills not acted upon by the Governor is echoed in Article IV, Part 1, Section 1, which establishes the people's reservation of power at their own option to approve or reject at the polls any Act [or] *bill* … passed by the joint action of both branches of the Legislature." Me. Const. Art. IV, Pt. 1, § 1 (emphasis added). Article IV's consistent reservation and application of referendum rights to veto *bills* demonstrates that the People's Veto is *not* put on hold until such time that the governor takes action. Any contrary interpretation would render meaningless Article IV's inclusion of the word *bills* in both Part 1, Section 1 and Part 3, Section 17. The Court, therefore, "must give to the proviso the broad meaning which its language imports," *Moulton v. Scully*, 111 Me. 428, 89 A. at 952.

Moreover, the facts of the case at bar demonstrate that the Referendum Proponent in this case had ample opportunity to exercise her right to timely petition for referendum of passed L.D. 1083 (the "Ranked-Choice Voting Bill") before it was chaptered and took effect on January 12, 2020.

By September 6, 2019—ten days after the Legislature passed the Ranked-Choice Voting Bill during its one-day First Special Session—it was clear that the governor planned to allow the Ranked-Choice Voting Bill to become law without executive action during the next legislative session. A. 18 ¶¶ 4, 7-8. The Referendum Proponent filed a timely application with the Secretary of State's Office, pursuant to 21-A M.R.S.A. § 901(1), seeking to initiate a people's veto referendum of the Ranked-Choice Voting Bill A. 19 ¶ 10; A. 22-23. Although the Secretary of State's Office erroneously refused to complete the Section 901(1) application and issue petitions based on an erroneous interpretation of Article IV, Part 3, Section 17, A.21, the referendum proponent had a remedy at law pursuant to the Administrative Procedures Act to obtain judicial review and confirm Section 17's unambiguous construction extending the people's veto right to bills, not just chaptered acts that had become law. *See* 5 M.R.S.A. § 11001(2). Ultimately, however, no action was taken to determine proper application of Section 17, and no people's veto petition was filed within Section 17's 90-day deadline on November 25, 2019. A. 19 ¶ 11.

Even if the Referendum Proponent reasonably relied upon the Secretary of State's Office erroneous interpretation of Section 17, the Constitution, Article V, Part 2, Section 4 prohibits the Secretary of State from being estopped against performing "such duties as are enjoined by this Constitution," including barring

from the ballot any people's veto referendum not petitioned by the 90th day after adjournment of the session of the Legislature that passed it.

B. The Opinion of the Attorney General Discussing Section 16's Hypothetical Application Fails to Establish a Long Course of Government Conduct Warranting Deference.

Appellees argue that interpretation of Section 16's meaning must be guided by a 1979 Attorney General's opinion that they claim has established a long course of government practice that should inform the Court's interpretation. *See* Red Br. 15; Green Br. 20-22. But, even if the Court finds Section 16 ambiguous and necessitating analysis of the Section's history and purpose, an opinion of the Attorney General exploring Section 16's application in the novel circumstances at bar stops short of establishing a "long course of practice" that could inform interpretation of ambiguous constitutional language. *See Morris v. Goss*, 147 Me. 89, 108–09, 83 A.2d 556, 566 (1951) (holding that ambiguous constitutional provisions are "settled by the contemporaneous construction *and* the long course of practice in accordance therewith" (emphasis added)).

While the Attorney General's 1979 opinion, Me. Op. Att'y Gen. No 79-170, 1979 WL 482479 (Sept. 21, 1979), considers the required application of Section 16 should the novel circumstances presented by the case at bar arise, Appellees fail to identify even one example where the 1979 Attorney General's opinion was in fact applied. Red Br. 15; Green Br. 20-22. Absent an actual practice, the Attorney

General's prior opinion exploring application of law in hypothetical and yet-untested circumstances is insufficient to establish a "long course of practice" informing a contemporaneous construction of Section 16. *See* 7 Am. Jur. 2d Attorney General § 9 ("The opinions of the attorney general have in no sense the effect of judicial utterances.")

II. 21-A M.R.S.A. § 901(1) PROPERLY LIMITS PEOPLE'S VETO PETITION-GATHERING UNTIL THE LEGISLATURE ADJOURNS.

The Secretary of State and the Referendum Proponent contend that, if the 129th Legislature's Second Regular Session was the session in which the Ranked-Choice Voting Law "passed," the Referendum Proponent's application for people's veto petitions submitted in January 2020 satisfied 21-A M.R.S.A. § 901(1)'s requirement that an application for petitions be presented "*within* 10 days *after* adjournment of the legislative session at which the act in question was passed." § 901(1) (emphasis added). Appellees defend the timeliness of the Referendum Proponent's January application on the basis that (i) limitations on the start of people's veto petition-gathering would impede proponents' constitutional rights; (ii) "within--after" timing clauses applied in other circumstances were construed to set an end date without a fixed point of beginning; and (iii) Section 901(1) has previously been applied by the Secretary of State and other people's veto proponents in the same manner.

These arguments are unpersuasive because they misconstrue the words of Section 901(1); disregard Section 901(1)'s unique context tailored to accomplish the framers' intent of Article IV, Part 3, Section 17 to limit people's veto signature gathering to a 90-day period; and allow an error of law that is inconsistent with the framer's intent to be perpetuated indefinitely.

A. Section 901(1) Does Not Impose Restrictions Inconsistent with the Constitutional Rights that the People's Veto Framers Intended.

Appellants agree with the Secretary of State that the Court should not construe Section 901(1) in a manner more restrictive than Section 17. Red Br. 20. Appellants disagree, however, that Section 901(1), which was adopted in 1931 to effectuate Section 17, imposes any such limitation inconsistent with framers' intended application of the people's veto provision in Maine's Constitution. Blue Br. 17-20. Rather, Section 901(1) facilitates Section 17's intent to limit people's veto petition-gathering to the 90-day period after legislative adjournment. *Id.*

The people's veto framers, during legislative debate prior to enaction of the Resolve to adopt to people's veto section, observed that its application was limited to gathering petitions "within that time, within the ninety day" time period after adjournment. Legis. Rec. 640 (1907). This intended limitation is further evidenced by Article IV, Part 3, Section 17's original wording, requiring filing of the referendum petition "within ninety days after the recess of the legislature," Res. 1907, Ch. 121 at 1478. That meant a petition could be presented no earlier than

"after the recess of the legislature." *Id.* Such construction "plainly limited the presentation" of a petition to the time of adjournment. *Allen v. Quinn*, 459 A.2d 1098, 1102 (Me. 1983) (interpreting same construction as applied to direct initiatives pursuant to Article IV, Part 3, § 18).

Although Section 17's wording has since been amended, the legislative history of the 1975 amendment demonstrates that the amendment was not intended to expand the window for filing valid petitions to include the time prior to legislative adjournment. Blue Br. 19. Rather, the amendment was necessary to tailor the final dates and hours when a petition could be filed to avoid requiring the Secretary of State to staff the office at all day or weekend hours on the 90th day. *See* Report of the Judiciary Committee on the Initiative and Referendum Process 12-13 (Dec. 1974).

Section 901(1)'s history and context, together with Section 17's history and intent, must inform the Court's construction of the statute's intended meaning for its "within--after" clause. *Novak v. Bank of N.Y. Mellon Trust Co.*, 783 F.3d 910 (1st Cir. 2015) emphasized that context was critical to the phrase's correct interpretation. "'[W]ithin' has various meanings," and "when coupled with 'after' … those meanings would have differing consequences." *Novak*, 183 F.3d at 914. Accordingly, the "within--after" construction must be "illuminated by the [statute's] surrounding provisions, and the legislative history." *Id.*

B. *Remmel v. Gwadosky* and Other Cases Defining "Within--After" Wording to Set an End Date Without a Point of Beginning are Not Applicable.

This Court should not rely on *Remmel v . Gwadosky*, AP-97-112 (Me. Super. Ct., Ken. Cty., Nov. 21, 1997) (Red. Br. Add.) for guidance on Section 901(1)'s correct interpretation. The Superior Court in that case misread the caselaw cited and disregarded Section 901(1)'s necessary context.

The Superior Court's error in *Remmel* was borne from its mistaken reading of *Leader v. Plante*, 95 Me. 339 (1901), a rare Maine case to have interpreted similarly constructed language. *Remmel* concluded that *Leader* stood for the proposition that "within--after" construction is "synonymous with 'on or before'," *Remmel*, Red. Br. Add. 7. *Leader* provided no support for that reading. The *Leader* Court sought only to define the "within" portion of the "within--after" clause. *Leader* inquired whether a promissory note's due date defined as "within one year after date [of issuance]" was sufficiently definite to be enforceable. 50 A. at 53. The question presented in *Leader* required no analysis whether the "within--after" clause fixed a point of beginning because the start date was already defined as that date when the note was issued. *Id.* *Remmel*, nonetheless, incorporated *Leader*'s limited analysis of the word "within," coupled with citation to non-Maine cases that similarly interpreted the word "within" in isolation, and held that Section 901(1)'s "within--after" clause construction "provides merely an end point and not

a beginning point." Red Br. Add. 8 n,4, 9. *Remmel* additionally disregards this Court's interpretation of the meaning of the "within--after" construction discussed in *Allen v. Quinn*, 459 A.2d at 1102, and fails to recognize the intent of the people's veto framers to limit the petition gathering period, as evinced by the legislative history documents Appellants have relied upon in this case.

Similarly, the Secretary of State's reliance on the Nebraska Supreme Court's holding in *Klosterman v. Marsh*, 143 N.W.2d 744 (Neb. 1966) to support their preferred construction of Section 901(1) is also unpersuasive. While *Klosterman* relates to similar subject material, the case provides no guidance for interpretation of Section 901(1). *Klosterman* concluded that a "within--after" clause in Nebraska's legislative referendum law was *unambiguous* and *incapable* of multiple interpretations necessitating the broader contextual analysis that *Novak* demanded. *See* 143 N.W.2d at 747. Absent discussion of *how* the *Klosterman* court reached its arbitrary conclusion that the wording is unambiguous, the case fails to inform this Court's necessary analysis of Section 901(1)'s "within--after" timing in context of the statute's particular history and purpose. *See Novak*, 183 F.3d at 914.

The string of other out-of-state cases Appellees cite in support of their preferred construction of Section 901(1)'s "within--after" clause are also inapplicable to Section 901(1)'s interpretation, because the variety of circumstances presented in those cases share no similarity or relation to the unique

context that informs Section 901(1)'s "within--after" phrase. Recognizing the ambiguity of the phrase's construction, analysis requires the interpretation be "illuminated by the [statute's] surrounding provisions, and the legislative history," *Novak*, 183 F.3d at 914. The lack of comparable context in Appellees' cited cases *Young v. Waldrop*, 109 P.2d 59 (1960); *Southball v. State*, 796 S.E.2d 261 (Ga. 2017); or *Glaze v. Grooms*, 478 S.E.2d 841 (S.C. 1996) renders them uninstructive to adducing Section 901(1)'s particularized application.

C. Prior Mistaken Applications of Section 901(1) in Reliance on *Remmel* Do Not Compel the Repetition of that Error.

The Secretary of State's prior failure to lawfully apply Section 901(1) to past people's veto petition campaigns—including the error that benefited ranked-choice voting proponents in an earlier referendum[1]— does not warrant continuation and repetition of that known error of law. The Secretary of State's application of the referendum procedures pursuant to *Remmel* is not analogous to a long-practiced tradition and historical interpretation that informs a "practical construction" of Section 901(1) or the people's veto provisions it effectuates. *See Opinion of Justices*, 2015 ME 107, ¶ 47, 123 A.3d 494, 509.

[1] Even if ranked-choice voting proponents past referendum benefited from the Secretary of State's misapplication of Section 901(1), ranked-choice voting proponents still collected all petition signatures during the 90-day period after legislative adjournment pursuant to Article IV, Part 3, Section 17's intended application. Red Br. 23. By contrast, the Referendum Proponent collected signatures for over six weeks prior to legislative adjournment. App. 19 ¶ 19.

Moreover, the theory of legislative acquiescence does not apply here to require the Court to substitute *Remmel's* flawed interpretation of Section 901(1) for the Legislature's true intent. *See* Red Br. 22. Legislative acquiescence to *Remmel* cannot be drawn from the Legislature's amendment to Section 901(1)—regardless what the amendment was—because the Legislature's presumed knowledge of court decisions extends only to *this* Court, not the Superior Court where *Remmel* was decided. *See Bowler v. State* 2014 ME 157, ¶ 8, 108 A.2d 1257; *see also Realco Services, Inc. v. Halperin*, 355 A.2d 743, 745 (Me. 1976) (adopting the principal that "a Legislature, in enacting a particular statute, would be guided by the past decisions of *the highest court* in its state").

CONCLUSION

For the aforementioned reasons, and those set forth in Appellants' underlying brief, the Court should answer the questions of law presented on report of the Kennebec County Superior Court as follows:

I. *The First Special Session* of the 129th Legislature was the session at which L.D. 1083, An Act to Implement Ranked-choice Voting for Presidential Primary and General Elections in Maine, was passed for purposes of Me. Const. Art. IV, Pt. 3, §§ 16 and 17;

II. P.L. 2019, Ch. 539 was effective January 12, 2020; and,

III. 21-A M.R.S.A. § 901(1) does not permit filing of a People's Veto application with the Department of the Secretary of State prior to adjournment of the legislative session at which the Act in question was passed.

Dated at Portland, Maine this 14th day of July, 2020.

Respectfully submitted,

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v.

CERTIFICATE OF SIGNATURE

Secretary of State, et al.

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I am filing the electronic copy of a brief with this certificate. I will file the paper copies as required by M.R. App. P. 7A(i). I certify that I have prepared (or participated in preparing) the brief and that the brief and associated documents are filed in good faith, conform to the page or word limits in M.R. App. P. 7A(f), and conform to the form and formatting requirements of M.R. App. P. 7A(g).

Name(s) of party(ies) on whose behalf the brief is filed: Clare Hudson Payne, Philip Steele, Frances M. Babb, and The Committee for Ranked Choice Voting

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CERTIFICATE OF SERVICE

I, James Monteleone, hereby certify that on July 14, 2020, two copies of the Appellants' Reply Brief were served via electronic and first-class mail upon counsel of record as follows:

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